Supreme Court, U.S.
NOV 24 1993

No. 93-661

In the
Supreme Court of the United States

OCTOBER TERM, 1993

White Consolidated Industries, Inc.
Petitioner,

vs.

Pension Benefit Guaranty Corporation,
Respondent.

White Consolidated Industries, Inc., and John Doe(s),
Petitioners,

-against-

The Blaw Knox Retirement Income Plan, Blaw Knox Pension Plan, Blaw Knox IAM Pension Plan, Blaw Knox Equipment Pension Plan, Blaw Knox Duraloy Pension Plan for Salaried Employees, Blaw Knox Duraloy Hourly Pension Plan and Fiduciaries Dean G. Wilson and Richard A. McIntyre,
Respondents.

Brief in Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

Brief In Opposition To Petition For Writ Of Certiorari

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SUMMARY OF ARGUMENT

This case does not warrant a writ of certiorari because the opinion of the United States Court of Appeals for the Third Circuit reflects a principled exercise of appellate review. Contrary to the Petitioner's belief, the Court of Appeals' decision does not present this Court with an important issue of federal law. In addition, this ruling does not conflict with any precedent of this Court or any other federal court. Finally, nothing in the Court of Appeals' opinion justifies the extraordinary exercise of this Court's power of supervision.

ARGUMENT

I. Introduction

In this case, the United States Court of Appeals for the Third Circuit reviewed two orders granting motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). The court held that the two complaints dismissed by the district court did state causes of action under particular sections of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1301 *et seq.*[1] First, with respect to the counts in both complaints under Section 1369, the court in conventional fashion interpreted undefined words in the statute in view of the statute's background and its legislative purpose. Second, in reviewing the Pension Benefit Guarantee Corporation's ("PBGC") claim under Section 1362, the court read the allegations of the PBGC's complaint in light of pertinent precedent of this Court and determined that the allegations were sufficient to withstand a motion to dismiss.

Petitioner, White Consolidated Industries, Inc. ("WCI") now portrays this routine exercise of appellate review as "perilous and unsound" precedent that will encourage federal agencies to attempt unbridled enforcement of the statutes they administer. WCI Petition 26, 15. Specifically, WCI's petition asserts: 1) that the issue of predecessor liability under ERISA is an important question of federal law that should be settled by this Court; 2) that the decision of the Court of Appeals conflicts with decisions of this Court; and 3) that this Court should exercise its supervisory power over the Court of Appeals. WCI Petition 14. Contrary to WCI's characterization that the decision is "unsound, unwise and unfair," WCI Petition 15, the opinion of the appellate court reflects an ordinary, principled exercise of appellate review, appropriately guided by settled principles of statutory interpretation and pertinent precedent of

[1]Two separate complaints were filed in the district court, one by the Respondent pension plans and the other by the PBGC. Both complaints allege a cause of action under 29 U.S.C. § 1369. Only the PBGC complaint alleges a violation of 29 U.S.C. § 1362.

this Court. As such, the Blaw Knox Retirement Plans[2] ("the Plans") respectfully request this Court to deny WCI's Petition for Writ of Certiorari.

II. The Opinion Of The Court Of Appeals Reflects A Principled Exercise Of Appellate Review

A.

Following Accepted Principles Of Statutory Interpretation The Court Of Appeals Properly Held That Each Complaint Stated A Cause Of Action Under ERISA Section 1369.

The Court of Appeals interpreted ERISA, Section 1369(a)[3], focusing on the meaning of "becomes effective." The court followed accepted principles of statutory interpretation to determine the meaning of this term.

The Court of Appeals began by carefully reading the statute. The court found that two distinct dates were used in the text of Section 1369(a): 1) the date the transaction was "entered into,"; and 2) the date the transaction "becomes effective." The court observed, "[T]his different terminology within the same

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[2]Specifically, the Respondents are The Blaw Knox Retirement Income Plan, Blaw Knox Pension Plan, Blaw Knox IAM Pension Plan, Blaw Knox Equipment Pension Plan, Blaw Knox Duraloy Pension Plan for Salaried Employees, Blaw Knox Duraloy Hourly Pension Plan and Fiduciaries Dean G. Wilson and Richard A. McIntyre. These respondents were plaintiffs in Civil Action No. 91-01629, *The Blaw Knox Retirement Income Plan, et al. v. White Consolidated Industries, Inc., et al.*, which on appeal was docketed at No. 92-3612.

[3]The text of 29 U.S.C. § 1369(a) is as follows:

> If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date. This subsection shall not cause any person to be liable under this subtitle in connection with such plan termination for any increases or improvements in the connection with such plan termination for any increases or improvements in the benefits provided under the plan which are adopted after the date on which the transaction referred to in the preceding sentence becomes effective.

statutory section evidences a congressional intent that a transaction need not "become[ ] effective" on the same day it is "enter[ed] into." App. 11.[4]

Because "becomes effective" was not defined in the statute, and in context was ambiguous, the court properly concluded that interpretation of this phrase "must be analyzed against the background of the statute as a whole and its legislative purpose." App. 11. *Accord, Crandon v. United States*, 494 U.S. 152, 158 (1990). After reviewing the legislative history, the court determined that Congress' stated objective in enacting Section 1369 was "to prevent companies from transferring underfunded plans to a weaker company in order to evade [its pension] liability." App. 14. The court reasoned that Congress intended to relieve the transferor of liability for pension plan obligations if, for a five year period, the financial strength of the transferee primarily would sustain the pension plan obligations. App. 13-15. To accomplish this intent, Congress established an irrebuttable presumption that was premised upon the survival of the pension plans for five years under the financial stewardship of the transferee. App. 13-15. The court concluded that it was contrary to the intent of Congress to interpret "becomes effective" to commence the five year period of the transferee's financial viability while WCI was paying approximately 80% of the annual minimum funding requirements in each of the five years following the closing date of the transaction. Specifically, the Court of Appeals held that "becomes effective" means the date upon which "the company that transferred a pension plan no longer makes substantial pension contributions." App. 14.

B.

The Court Of Appeals Read The Allegations Of The PBGC Complaint Under § 1362 Against This Court's Precedents On The Sham Transaction Doctrine And Properly Held That The PBGC Complaint Stated A Cause Of Action

The Court of Appeals next considered the PBGC's claim that the transaction between WCI and Blaw Knox Corporation

[4]All citations to the Court of Appeals' decision will refer to Petitioner's Appendix as follows "App. _____."

was a sham for the sole purpose of avoiding WCI's termination liability under Section 1362 of ERISA. App. 18-21. After observing that the "sham transaction doctrine . . . dictates that the substance and not the form of a transaction controls," App. 18, the Court of Appeals applied the teachings of this Court to the allegations made by the PBGC in the complaint. After comparing the allegations of the PBGC to the arguments of WCI, App. 19, the court could not, as a matter of law, conclusively discount the PBGC's ability to establish that WCI's sole motivation was to avoid its pension liabilities. Accordingly, the court held that the complaint sufficiently pled a cause of action upon which relief could be granted. App. 21.

III. This Case Does Not Present An Important Question Of Federal Law Which Warrants Review By This Court

A writ of certiorari should be issued when a case presents this Court with an important question of federal law. Supreme Court Rule 10.1(c). However, this Court does not grant a writ of certiorari for every academically interesting question. Rather, important questions of federal law transcend the "academic or episodic." *Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U.S. 70, 79 (1955); *See also United States v. Standard Oil Co.*, 332 U.S. 301, 302 (1947) ("We granted certiorari because of the novelty and importance of the principal question.") In addition, this Court has stated that it will only grant a writ of certiorari in cases "involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Thus, the issue must be important to the public at large, and not merely impact the parties to the litigation.

A variety of factors determine whether a case presents an important question of federal law. Among these factors are the number of pending cases dealing with the same issue, the number of individuals affected by the decision and the affect of the issue on the administration of a federal statute. *See United States v. Hall*, 423 U.S. 161, 167 (1976) (seventy pending cases in the federal courts dealt with the same tax issue); *United*

States v. Powell, 330 U.S. 238, 239 (1947) ("The cases are here on petitions for writs of certiorari which we granted because of the importance of determining the controlling principle for settlement of the many claims of this character against the Government."); *Patterson v. Lamb,* 329 U.S. 539 (1947) (claims of thousands of draftees affected by the decision); *United States v. Ruzicka,* 329 U.S. 287, 288 (1946) ("We brought this case here, 327 U.S. 776, because it raises questions of importance in the administration of the Agricultural Marketing Agreement Act of 1937."); *Rothensies v. Electric Storage Battery Co.,* 329 U.S. 296, 299 (1946) ("The gravity of this holding to the administration of the tax laws led us to grant certiorari.") None of these factors are present in the instant case.

First, WCI did not allege in its petition that there are any cases pending in any federal courts which address this issue. This is especially important given that only one other federal court has interpreted Section 1369(a). *See In re Doskosil,* 130 B.R. 858 (Bankr. D. Kansas 1991). In *Doskosil,* the court held that normal commercial transactions between the transferee and transferor after the sale of a business and its pension plans do not amount to transactions to evade pension liability under Section 1369(a). The court instead defined these transactions as those that transfer the "responsibility for meeting the funding requirements of ERISA." *Id.* at 868. Thus, the instant case is the only case decided by, or pending in, any federal court which challenges a transferee's direct contributions to pension plans during the five years after the transfer of those plans.

Second, even though this decision will affect the participants in the Plans, the PBGC and WCI, the Petitioner has not stated, and cannot state, that this decision will have any impact beyond these parties. Section 1369 took effect on January 1, 1986. Since that date, only the Plans, and the PBGC in the instant case and in *Doskosil* have sought to enforce predecessor liability through Section 1369. Given that this statute has not been applied regularly to enforce predecessor liability, there is no objective evidence of repeated use of Section 1369 to support an assertion that this issue will impact the public at large. Because WCI has not demonstrated that the decision of the

Court of Appeals will have any impact beyond the instant case, this case does not warrant a writ of certiorari.

Finally, the decision by the Court of Appeals will not significantly impact the administration of this statute. The Court of Appeals' ruling simply restores the bright line test established by Congress in Section 1369. Under the reasoning of the decision, employers contemplating transferring pension plans will scrupulously avoid any artifice that conceals the transferee's true financial viability. The clean break in pension plan financial support anticipated by Congress, and articulated by the Court of Appeals, as the basis for the presumptive five year rule, allows the PBGC to recover monies from predecessors who should be held accountable when pension plans fail under the stewardship of a financially weak transferee. Therefore, this decision will promote the administration of this statute.

IV. The Court Of Appeals' Decision Does Not Conflict With Any United States Supreme Court Precedent

In its petition, WCI contends that the Court of Appeals' decision conflicts with this Court's decisions which created the "sham transaction doctrine." WCI Petition 26-27. For such a conflict to justify review by this Court, the conflict must be direct and apparent. For example, in *Braen v. Pfiefer Oil Transportation Co.*, 361 U.S. 129, 130 (1959), the Court granted certiorari because the court of appeals' decision conflicted with a specific holding of this Court on a limited issue of the interpretation of the Jones Act. *See also Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982) (court of appeals decision "appeared to be in conflict with our precedents.") Similarly, in *Schlude v. Commissioner*, 372 U.S. 128, 129 (1963) this Court granted certiorari because the court of appeals did not correctly apply a specific Supreme Court decision. This Court had previously remanded the case for application of its decision. However, after receiving a second petition for writ of certiorari, this Court stated that because the court of appeals' ruling still "appeared to be in conflict with our precedents, we granted certiorari." *Id.* at 131. No such direct and apparent conflict exists in the instant case.

Here, the Court of Appeals simply applied the sham transaction doctrine to WCI's efforts to avoid plan termination liability under ERISA, Section 1362. 29 U.S.C. § 1362. Prior to the enactment of Section 1369, Section 1362 addressed the liability of contributing plan sponsors upon termination of a pension plan. Specifically, Section 1362 states that contributing sponsors at the time of the termination of the plan remain liable for any outstanding pension liabilities. In these circumstances, the court held that a transaction designed to hide a plan sponsor's contributions to a pension plan could be considered a "sham transaction" if the complaint alleges that the sole motive of the transaction was to avoid the statutorily imposed termination liability. App. 20-21.

The court acknowledged that the sham transaction doctrine, which states that the substance and not the form of the transaction governs, was developed by this Court through a line of tax cases. *See Diedrich v. Commissioner,* 457 U.S. 191, 196 (1982); *Knetsch v. United States,* 364 U.S. 361 (1960). The court found, after reviewing these cases, that the allegations of the complaint were sufficient to state a claim premised on the doctrine. App. 18-19. Thus, the court held that "the PBGC's claim that the transfer was a sham will survive the motion to dismiss." App. 20-21.

To reach this conclusion, the Court of Appeals compared the definition of a sham transaction defined by its case law to the definition articulated by this Court. Specifically, the court compared the Third Circuit's definition, which states that the transaction must be "fictitious or . . . [have] no business purpose or economic effect," to this Court's holding in *Gregory v. Helvering.* App. 19. *Citing Lerman v. Commissioner,* 939 F.2d 44, 53 (3d Cir. 1990), *cert. denied* _____ U.S. _____, 112 S.Ct. 590 (1991). As observed by the Court of Appeals, this Court in *Gregory,* "explicitly stated . . . that the sole object and accomplishment of [the transaction] was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner." App. 19-20. *Quoting Gregory v. Helvering,* 293 U.S. 465, 469 (1935). Concluding that its formulation of the doctrine

in *Lerman* was consistent with this Court's definition in *Gregory*, the Court of Appeals proceeded to examine the allegations of the complaint to determine if they sufficiently alleged a sham transaction. App. 20-21.

WCI contends that the court, by not crediting its contention that the transaction had a legitimate business purpose, misapplied this Court's holding that a sham transaction cannot have any business purpose. Specifically, WCI contends that the motivation for the transaction was to eliminate the losses incurred by the Blaw Knox divisions. However, as with any motion to dismiss, the allegations of a complaint are to be viewed most favorably to the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974). Thus, the court stated, "[i]t is unclear from the pleadings, however, whether or not getting rid of these operating losses was a factor in WCI's decision to sell the businesses and pension plans. WCI's contention that one objective of the sale was to dispose of an unprofitable operation is undermined by the allegation that it summarily rejected any offer to buy the businesses that required it to retain the pension plan liabilities." App. 20-21. In conclusion, the court held that "[b]ecause the complaint alleges that WCI was motivated solely by a desire to be relieved of pension liabilities, the PBGC's claim that the transfer was a sham will survive the motion to dismiss." App. 21.

In view of the procedural posture of the case and the allegations of the PBGC, the court properly held that the complaint stated a cause of action. The Court of Appeals did not abridge this Court's precedent. Instead, the decision simply applied the law as announced by the court. Accordingly, WCI's argument is unfounded and does not warrant granting a writ of certiorari.

V. This Decision Does Not Require The Extraordinary Exercise of This Court's Supervisory Power

This Court invokes its supervisory power to oversee the administration of justice in the federal courts. *See Hoffa v. United States*, 385 U.S. 293, 313 (1966). Thus, certiorari on this

ground is only appropriate when the Court is reviewing procedural actions taken by federal courts that affect the administration of justice. *See Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (certiorari granted to review administrative decision by a district court to exclude hourly wage laborers from its jury panels); *In re McConnell*, 370 U.S. 230, 232 (1962) (certiorari granted to assure self-restraint of district judges in the use of summary power for punishing contempt); *McNabb v. United States*, 318 U.S. 332, 341 (1943) ("In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, . . . this court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions.") Unlike these cases, the decision by the Court of Appeals does not address any administrative issues or directly review any similar actions taken by the district court. Instead, in this case, the Court of Appeals simply rendered a reasoned decision in an appeal from an order granting motions to dismiss. The opinion adheres to accepted principles of statutory interpretation and defines an ambiguous term in a statute. Moreover, the opinion follows the decisions of this Court and simply applies the sham transaction doctrine to an analogous situation to find that the PBGC complaint stated a cause of action upon which relief may be granted. Nothing in the Court of Appeals' interpretation of Section 1369, nor in its application of the sham transaction doctrine, requires the extraordinary exercise of this Court's power of supervision over the administration of justice.

CONCLUSION

For the foregoing reasons, the Plans respectfully request this Court to deny WCI's Petition for Writ of Certiorari.

DATED: November 24, 1993

Respectfully submitted,

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